

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAF
C/m
NOT FOR PUBLICATION

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DESIREE PHELAN, et al.,

Plaintiffs,

-against-

MARISOL TORRES, et al.,

Defendants.

MEMORANDUM & ORDER

04-CV-3538(ERK)

FILED

IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.

★ NOV 28 2005 ★

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Korman, Ch. J.

BROOKLYN OFFICE

I adopt the recommendation of the U.S. magistrate judge dated September 21, 2005, with the following exception. The motion to dismiss the various derivative claims filed on behalf of the adult plaintiffs is denied without prejudice to renewal. While I tend to agree with the U.S. magistrate judge that the case is distinguishable from the loss of consortium cases on which the defendants rely, R&R at 7, I have some questions about the R&R as it relates to extending the time to file a late notice claim. Nevertheless, I need not resolve the issue at this point. I have repeatedly applied the pragmatic rule that, if one of a number of integrally related causes of action have to be tried, it makes little sense to grant a motion to dismiss as to one or more of them, as it may prove necessary to hold yet another trial in the event that it is determined on appeal that the motion to dismiss was improperly granted. As observed by Judge Clark in an analogous context: "[T]here seems no question that in the long run fragmentary disposal of what is essentially one matter is unfortunate not merely for the waste of time and expense caused the parties and the courts, but because of the mischance

of differing dispositions of what is essentially a single controlling issue. Audi Vision Inc. v. RCA Mfg. Co., 136 F.2d 621, 625 (2d Cir. 1943).

Since the causes of action underlying the derivative damage claim must be tried in any event, it would be inconsistent with the pragmatic rule set forth above to resolve the derivative claim at this point.

SO ORDERED:

Brooklyn, New York
November 17, 2005

s/Edward R. Korman
Edward R. Korman
United States Chief District Judge